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No.

IN THE

Supreme Court of the United States

LORI DENISE RHOADS,
Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORP., IN ITS CAPACITY AS RECEIVER FOR STANDARD FEDERAL SAVINGS BANK AND STANDARD FEDERAL SAVINGS ASSOCIATION AND RESOLUTION TRUST CORPORATION, A/K/A STANDARD FEDERAL SAVINGS & LOAN ASSOCIATION, AS RECEIVER
Respondents

On Petition for Writ of Certiorari
To The Fourth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Questions pertaining to the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12117, 12203 ("ADA"):

1. Whether an employer can avoid liability for failing to provide reasonable accommodation by speculating that an ADA employee is not foreclosed from other employment, in general, because other law-abiding employers may be willing to provide reasonable accommodation.

2. Whether segregation can be used under the auspices of reasonable accommodation.

3. Whether a court of law should defer to the undisputed medical testimony of qualified treating physicians in determining whether an ADA plaintiff is substantially limited in one or more major life activities.

4. Whether an ADA plaintiff is required to subject herself to physical injury in order to demonstrate to a court that she is substantially limited in more than one major life activity.

5. Or, whether an ADA plaintiff can demonstrate through the competent medical testimony of her treating physicians that she is exercising a preemptive decision to avoid placing herself at risk of injury.

Questions related to the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 ("FMLA"):

6. Whether an employer can deny the taking of FMLA leave to an employee who has complied with the statute's notification requirements.

7. Whether an employer who refuses to follow the FMLA medical certification procedures can be given an open path to challenge an employee's serious health condition many years after the fact.

8. If so, whether an employer must comply with the Federal Rules of Civil Procedure and make such a challenge as an affirmative defense under the appropriate burden of proof.

9. Whether a court of law should defer to the undisputed medical testimony of qualified treating physicians in determining whether an FMLA plaintiff has a serious health condition.

Other questions

10. Whether the FDIC can invoke sovereign immunity when it acts as receiver for a failed financial institution.

11. Whether a prevailing pro se plaintiff is entitled to recover costs of litigation.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....vi

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOLVED.....1

FEDERAL STATUTES INVOLVED.....1

STATEMENT OF THE CASE.....3

A. Course of Proceedings Below.....3

B. Statement of the Facts.....6

REASONS FOR GRANTING THE PETITION.....12

I. THE FOURTH CIRCUIT'S CONFLICT WITH SUPREME COURT PRECEDENT AND OTHER CIRCUITS CREATE A SPLIT OF AUTHORITY AND IMPOSE UNDUE HARDSHIP ON ADA PLAINTIFFS.....12

A. Introduction.....12

B. A Qualified Individual With a Disability.....13

C. The Decision of the Court Below Is at Odds with Supreme Court Precedent.....15

D. Preemptive Decision to Avoid Injury.....15

II. THE DECISION OF THE COURT BELOW IS AT ODDS WITH THE STATUTORY PROVISIONS OF THE ADA AND DEPRIVES PLAINTIFF OF THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION AND DUE PROCESS OF LAW.....16

A. Foreclosed from Working "In General".....17

B. Defenses Based on a Deliberate Violation of the Law Undermine the Spirit of the ADA.....18

C. Segregation as a Means of Providing "Reasonable Accommodation".....18

D. Sick Leave as Reasonable Accommodation.....19

III. THE FOURTH CIRCUIT'S DECISION ON AN EMPLOYER'S RIGHT TO CHALLENGE DIVERGES FROM OTHER DECISIONS, OTHER COURTS OF APPEAL, AND RELEVANT LAW.....20

A. Introduction.....20

B. The Decision of the Court Below Conflicts With Prevailing Precedent and a Literal Reading of the Law.....22

C. The Decision of the Court Below Conflicts With Uniform Rules of Procedure.....24

D. An Employee's Decision to Follow Her Doctor's Advice.....25

IV. FDIC HAS NO SOVEREIGN IMMUNITY WHEN IT ACTS AS RECEIVER FOR A FAILED FINANCIAL INSTITUTION.....26

V. THE DECISION OF THE COURT BELOW ON PLAINTIFF'S STATUS AS A PRO SE DENIES HER DUE PROCESS OF LAW.....29

CONCLUSION.....30

TABLE OF AUTHORITIES

PUBLISHED OPINIONS **PAGE**

Atlantic Limousine, Inc. v. National Labor Relations Board, 243 F.3d 711 (3rd Cir. 2001).....25

Beninati v. FDIC, 55 F. Supp. 2d 141 (E.D. NY Jul. 14, 1999).....28

Bragdon v. Abbott, 524 U.S. 624; 118 S. Ct. 2196, 2206, 141 L. Ed. 2d 540 (1998).....16

Carlson v. Inacom Corp., 885 F. Supp. 1314, 1320 (D. Neb. 1995).....14

Choice Hotels International, Inc. v. Madison Three, Inc. et. al., 83 F. Supp. 2d 602 (D. Md. 2000.....25

Clarke v. Parkinson, 225 F. Supp. 2d 345, 355 (S.D. NY 2002)..... 30

Color Leasing 3, L.P. v. FDIC, as Receiver for Old Stone Bank, 975 F. Supp 177 (D. RI, Jun. 30, 1997).....27

Conanan v. FDIC, No. 00-CV-3091 (ESH) (D. DC. Jan., 2002).....29

Davis v. Parratt, 608 F.2d 717 (8th Cir., 1979).....30

Dugan v. Rank, 372 U.S. 609, 620 (1963).....28

Dutton v. Johnson County Board of Commissioners, 859 F. Supp. 498, 506 (D. Kan. 1994).....14

Estes v. Meridian One Corp., 2001 U.S. App. LEXIS 4443 (4th Cir. 2001).....24

Ex parte New York, 256 U.S. 490, 502 (1921).....28

Gao v. Jenifer, 185 F.3d 548 (6th Cir. 1999).....28

Greenway v. Buffalo Hilton Hotel, 143 F.3d 47 (2nd Cir. 1998).....27

Hamper v. Virginia Electric & Power Co., 831 F. Supp. 1300, 1306 (E.D. Va. 1993).....14

Hodgens v. General Dynamics Corp., 144 F.3d 151, 164 (1st Cir. May 21, 1998).....26

Kay v. Ehrler, 111 S. Ct. 1435 (1991).....30

Land v. Dollar, 330 U.S. 731, 738 (1947).....28

Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949).....28

Miller v. AT&T Corporation, 250 F.3d 820, 843 (4th Cir. May 7, 2001).....23,24,25

NLRB v. Brown & Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963).....25

Olmstead v. L.C., 138 F.3d 893; (S. Ct. Jun. 22, 1999).....19

O'Melveny & Myers v. FDIC, 512 U.S. 79, 86 (1994).....27

Poe v. Memphis Light, Gas & Water Division, 1999 U.S. App. LEXIS 32083, *8-10 (6th Cir. Nov. 30, 1999)....28

Porter v. United States Alumoweld Company, Inc., 125 F.3d 243 (4th Cir. Sep. 15, 1997).....14

Quint v. A.E. Staley Manufacturing Co., 172 F.3d 1 (1st Cir. 1999).....16

Reich v. Standard Register Co., 1997 U.S. Dist. LEXIS 3021 (W.D. Va. 1997).....26

Rhoads v. FDIC, et. al., 2001 U.S. App. LEXIS 15588 (4th Cir. Jul. 12, 2001).....*in passim*

Rhoads v. FDIC, et. al., 956 F. Supp. 1239 (D. Md. 1997).....*in passim*

Roe v. Doe, 28 F.3d 404, 406-07 (4th Cir. 1994).....15

School Board of Nassau County v. Arline, 480 U.S. 273, 287; 94 L. Ed. 2d 307, 107 S. Ct. 11234 (1987).....15

Stekloff v. St. John's Mercy Health Systems, 218 F.3d 858, 863 (8th Cir. 2000).....22,26

Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224 (2nd Cir. 2000).....27

FEDERAL STATUTES

29 C.F.R. § 825.114.....20

29 C.F.R. § 825.114(a)(2).....2

29 C.F.R. § 825.301.....23

29 C.F.R. § 825.303(a).....20

29 C.F.R. § 825.304(c) 23

29 C.F.R. § 825.305.....11

29 C.F.R. § 825.305(a).....21, 24

29 C.F.R. § 825.305(c).....21

29 C.F.R. § 825.306.....21

29 C.F.R. § 825.307(a).....21

29 C.F.R. § 825.307(a)(2).....23

29 C.F.R. § 825.307(c).....21

29 C.F.R. § 825.312.....2

29 C.F.R. § 825.312(b).....23

29 C.F.R. § 825.400(c).....24

29 C.F.R. § 1630.2(i).....12

29 C.F.R. § 1630.2(j)(1)(ii).....12

29 C.F.R. § 1630.2(o)(Appendix).....19

12 U.S.C. § 1819.....28

12 U.S.C. § 1819(a).....28

12 U.S.C. § 1821(d)(2)(A).....27

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1291.....4

28 U.S.C. § 1331.....3

28 U.S.C. § 1343.....3

28 U.S.C. § 1367(a).....3

29 U.S.C. §§ 2601—2654.....2, 3

29 U.S.C. § 2611(11).....20

29 U.S.C. § 2613(a).....20

29 U.S.C. § 2613(b)(1)—(3).....20

29 U.S.C. § 2613(c)—(d).....20

29 U.S.C. § 2613(c)(1).....22

29 U.S.C. § 2613(4)(B).....20

29 U.S.C. § 2613 infra note 9.....20

29 U.S.C. § 2617(a).....3

42 U.S.C. § 1981(a)(b)(1).....27

42 U.S.C. § 1988.....30

42 U.S.C. § 2000e-5(f).....3

42 U.S.C. § 2000e-16, et. seq.....29

42 U.S.C. §§ 12101—12117, 12203.....1, 3, 27

42 U.S.C. § 12101(b)(1).....19

42 U.S.C. § 12102(2)(A).....12

42 U.S.C. § 12111(8).....13

42 U.S.C. §§ 12111(9)(A)—(B).....13

42 U.S.C. §§ 12112(a)—(b)(1).....2

42 U.S.C. § 12117.....3

42 U.S.C. §§ 12203(a)—(b).....2

42 U.S.C. § 12205.....27, 29

Fed. R. Civ. P. 8(b).....2, 25

Fed. R. Civ. P. 8(c).....2, 25

OTHER AUTHORITIES

S. Rep. No. 94-1011, p. 2 (1976).....30

S. Rep. No. 103-3, p. 28 (1993).....26

OPINIONS BELOW

The 2004 unpublished opinion of the court of appeals is reproduced in the appendix to the petition ("Pet. App.") at 1a. The 2001 published opinion of the court of appeals is reported at 2001 U.S. App. LEXIS 15588 (4th Cir. Jul. 12, 2001), and reproduced at Pet. App. 25a. The 2003 unpublished opinion of the district court is reproduced at Pet. App. 4a. The 1997 published opinion of the district court is reported at 956 F. Supp. 1239 (D. Md. Feb. 22, 1997), and reproduced at Pet. App. 66a.

JURISDICTION

The final judgment of the court of appeals was entered on April 16, 2004. *See* Pet. App. at 1a. Plaintiff's request for rehearing or rehearing en banc was deemed untimely filed. *See* Pet. App. at 1b. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, Section 1, provides, in relevant part, that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES INVOLVED

The Americans With Disabilities Act of 1990 ("ADA"), United States Code, Title 42, §§ 12101—12117, 12203, provides, in relevant part, that an employer must grant reasonable accommodation to a qualified individual with a disability that substantially limits one or more major life activities. In addition, the ADA specifically prohibits

employment discrimination based on disability, including segregation as a means of providing reasonable accommodation, *see* 42 U.S.C. §§ 12112(a)—(b)(1), and retaliation against individuals who assert their rights under the ADA, *see* Id. §§ 12203(a)—(b). The employment provisions of the ADA are reproduced at Pet. App. 11b.

The Family and Medical Leave Act of 1993 ("FMLA"), United States Code, Title 29, §§ 2601—2654, provides, in relevant part, that each year, an employer must grant up to 12 weeks of unpaid leave to eligible employees who provide adequate notification of the need for FMLA-qualifying leave, such as a serious health condition that makes the employee unable to perform the functions of the employee's position. A serious health condition is defined, in part, as an illness, injury, impairment, or physical or mental condition that involves "any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a healthcare provider." *See* 29 C.F.R. § 825.114(a)(2). The statue further provides, "an eligible employee who has complied with FMLA's notice and [medical] certification requirements may not be denied the taking of FMLA leave." *See* Id. § 825.312. The relevant provisions of the FMLA are reproduced at Pet. App. 37b and 78b.

Federal Rule of Civil Procedure 8(c) provides, in pertinent part, that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively... ...[any] matter constituting an avoidance or affirmative defense." Federal Rule of Civil Procedure 8(b) provides, in pertinent part, that "[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Fed. R. Civ. P. 8 is reproduced at Pet. App. 104b.

STATEMENT OF THE CASE

A. Course of Proceedings Below

Plaintiff sought relief in United States District Court for the District of Maryland under the ADA, 42 U.S.C. § 12101 et. seq., alleging her former employers ("Defendants") failed to accommodate her known disabilities and committed intentional acts of discrimination and retaliation with reckless indifference to her rights. The district court had jurisdiction over Plaintiff's claims under the ADA, conferred by 28 U.S.C. §§ 1331, 1343 and by 42 U.S.C. § 12117 and 42 U.S.C. § 2000e-5(f). In addition to the ADA claims, Plaintiff contended Defendants violated provisions of the FMLA, 29 U.S.C. § 2601 et. seq., by failing to provide leave for a documented illness, failing to comply with the FMLA's notice and medical certification processes for disputed illnesses, and for terminating her employment in retaliation for exercising her rights. Jurisdiction over Plaintiff's claims under the FMLA was conferred by 28 U. S.C. § 1331 and 29 U.S.C. § 2617(a).

Plaintiff further alleged Defendants intentionally and wantonly committed unlawful employment practices in violation of Maryland State law and Montgomery County local ordinances. Additionally, Plaintiff alleged Defendants failed to abide by the Maryland Wage Payment and Collection Law and breached its employment agreement. The trial court had pendent and ancillary jurisdiction over the claims arising out of state law pursuant to 28 U.S.C. § 1367(a).

On February 22, 1997, the lower court granted summary judgment to Defendants on Plaintiff's ADA and state employment claims, and denied her motion for summary judgment on the FMLA claim. *See* Rhoads v. FDIC, et. al., 956 F. Supp. 1239 (D. Md. 1997), *in general*, reproduced at Pet. App. 66a.

The case then proceeded to trial before a jury on February 23, 1998. After 6 days, the jury returned a

verdict in favor of Defendants contending, under the FMLA, Plaintiff had not "proved, by a preponderance of the evidence, [that] at any time between September 1 and September 15, 1993, she had a period of incapacity requiring absence from work, school or other regular daily activities for more than three consecutive days." *See* Special Verdict Form, reproduced at Pet. App. 109b.

The trial court denied Plaintiff's Rule 50 and Rule 59 post-trial motions after a hearing on August 12, 1998. *See* Order of Judgment, No. B-94-1548 (D. Md. Aug. 12, 1998) reproduced at Pet. App. 9b. Plaintiff's counsel then abruptly withdrew from representation, and Plaintiff subsequently filed a Rule 60(b) motion, *pro se*, on October 7, 1998. The lower court cited jurisdictional issues related to Plaintiff's timely filing of intent to appeal in declining to consider her motion. *See* Rhoads v. FDIC, et. al., No. B-94-1548 (D. Md. Nov. 4, 1998).

The United States Court of Appeals for the Fourth Circuit has jurisdiction over appeals from the United States District Court for the District of Maryland under 28 U.S.C. § 1291. The appellate court appointed the Georgetown Appellate Litigation Clinic as *amicus curiae* ("Amicus") to brief and argue in support of Plaintiff. On appeal, all decisions of the district court were affirmed, with the exception of Plaintiff's ADA retaliation claim, which was reversed and remanded for further proceedings. *See* Rhoads v. FDIC, et. al., 2001 U.S. App. LEXIS 15588 (4th Cir. Jul. 12, 2001), *in general*, reproduced at Pet. App. 25a. Plaintiff filed a *pro se* petition for rehearing and/or rehearing en banc on August 23, 2001, which was denied September 7, 2001. *See* Rhoads v. FDIC, et. al., No. 98-2374 (4th Cir. Sep. 7, 2001) reproduced at Pet. App. 3b.

Once again acting *pro se*, Plaintiff filed a petition for writ of certiorari on December 6, 2001. The petition was denied for lack of ripeness on June 24, 2002.

The court's mandate, remanding the case for further proceedings, was received by the district court on September 17, 2001, and the district court once again

recognized jurisdiction over Plaintiff's ADA retaliation claim.

Defendants were directed to submit a response to the outstanding Rule 60(b) motion. Citing law of the case doctrine, the lower court denied Plaintiff's *pro se* motion. *See* Rhoads v. FDIC, et. al., No. B-94-1548 (D. Md. Mar. 27, 2002).

On June 5, 2002, Defendants filed a motion for summary judgment on damages and to strike Plaintiff's demand for a jury trial under the ADA retaliation provisions. The court granted Defendants' motion to eliminate punitive damages, and denied remaining motions. *See* Rhoads v. FDIC, et. al., No. CCB-94-1548 (D. Md. Nov. 7, 2002).

Prior to a second trial, the court granted Defendants' motion to exclude evidence of Plaintiff's medical condition after her employment termination, then went on to deny Plaintiff compensatory damages during trial based on lack of medical evidence supporting injury.

Plaintiff won a jury verdict against Defendants on retaliation claims brought under the ADA. *See* Rhoads v. FDIC, et. al., No. CCB-94-1548 (D. Md. Dec. 16, 2002) reproduced at Pet. App. 5b. Plaintiff was awarded back pay and benefits in the amount of $120,006. In post-trial motions, Plaintiff was denied prejudgment interest, attorney fees and litigation expenses based on Defendants' arguments of sovereign immunity and Plaintiff's status as a *pro se* litigant. *See* Rhoads v. FDIC, et. al., No. CCB-94-1548 (D. Md. Sep. 30, 2003) reproduced at Pet. App. 4a.

A timely notice of appeal was filed on October 29, 2003. The Fourth Circuit affirmed the lower court's findings after reviewing the parties' informal briefs. *See* Rhoads v. FDIC, et. al., No. 03-2373 (4th Cir. Apr. 16, 2004) reproduced at Pet. App. 1a.

On July 7th, Plaintiff suffered a heart attack and was hospitalized for 4 days. She requested an extension of time to file this petition due to extraordinary circumstances. It is now due August 16, 2004.

B. Statement of the Facts

In September 1987, Plaintiff was hired by Defendant Standard Federal Savings Bank ("SFSB"), a Maryland thrift, as a financial analyst, at an annual salary of $20,000. Within two months, exposure to environmental tobacco smoke ("ETS") at Defendants' offices caused Plaintiff to seek medical treatment for respiratory infections and allergy symptoms resulting from an exacerbation of her asthma[1], a condition first diagnosed in early childhood. During the relevant time frame, Plaintiff also suffered and was treated for severe migraine headaches. Although she provided two physician's statements notifying her employer of her asthma and requesting she be placed in a smoke-free work area, Defendants took no direct action.

Throughout her five-year employment, Plaintiff consistently demonstrated outstanding job performance and consistently earned higher-than-average salary increases and bonuses. By February 1991, she had been promoted to Director of Financial Management, at an annual salary of $65,000, and had fiduciary responsibility for a $36 billion investment portfolio. However, ETS at Defendants' worksite routinely exacerbated Plaintiff's asthma and migraines, forcing her to seek medical attention. As before, she provided numerous physicians' statements requesting reasonable accommodation for her known disabilities, but Defendants consistently failed to take action.

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[1] Plaintiff's physician, Dr. Alan S. Chanales testified that Plaintiff suffers from *allergic* asthma as the result of exposure to certain environmental antigens. Along with cigarette smoke found in the public domain of "restaurants, shopping malls and other public facilities," Dr. Chanales noted, "...She also had severe allergic reactions to cats and other allergens, and did receive shots for several years [prior to working at SFSB] and seemed to get better in terms of not reacting so strongly to those substances..."

In early 1991, Plaintiff was moved to an office adjacent to a heavy smoker. She asked her supervisor to intervene, but there was little he could do to curb the smoking, even though the company was subject to an indoor smoking ban, established in 1990 by both the county and city in which Defendants' offices were located. When it became apparent Defendants were not willing to enforce the local ordinances, or the written company policies established in response to the "No-Smoking" legislation, she asked to be moved to a floor where the ETS was not so concentrated. Defendants refused her request without explanation. As a result, Plaintiff continued to suffer with exacerbations of asthma and migraine, often missing extended periods of time from work. She was never asked to provide documentation to support her need for sick leave, nor was any doubt about the nature of her illness ever expressed by Defendants.

In October 1992, Standard Federal Savings Bank was placed into receivership by Defendant Resolution Trust Corporation ("RTC"). The name of the bank changed to Standard Federal Savings Association ("SFSA"), and RTC officials assumed management of the bank's assets. The initial takeover was marked by a large contingent of RTC employees occupying the bank's offices, a significant number of whom smoked in the office, despite the many "No-Smoking" signs placed conspicuously around the building. The upsurge in ETS caused Plaintiff to suffer debilitating illnesses, requiring an absence from work lasting two months. As before, Defendants did not question her need for sick leave and did not doubt that she was suffering from an extended illness.

Again in the spring of 1993, Plaintiff appealed to her supervisor to intercede with the RTC officials who continued to violate the no-smoking laws and policies. In a memorandum written April 27, 1993, Plaintiff's supervisor pleaded, "[t]he smoking is having a devastating health effect on one of my employees. . . Please stop smoking immediately. If not because it is

illegal, then out of professional courtesy and human kindness." *See* Rhoads, 2001 U.S. App. LEXIS 15588 at *2. Yet, despite this entreaty, the illegal smoking continued unabated.

In early May 1993, Plaintiff met directly with senior RTC officials and urged them to comply with the smoking restrictions instituted by both the city and the county, and mandated by company policy. After expressing their resentment of laws restricting smoking, senior managers informed Plaintiff that they would not refrain from smoking in the building. Again, frustrated with the resistance she continued to meet, Plaintiff implored her supervisor to remedy the situation. He directed her to work from home in order to be assured of smoke-free conditions. While Plaintiff was opposed to being segregated from her co-workers in order to be assured of a safe working environment, she nonetheless complied, rather than continue to suffer painful and debilitating illnesses. From May through August 1993, Plaintiff was forced to work from home despite the loneliness and isolation she felt being away from the office. A defense witness testified that this forced segregation was a primary factor in the decision to terminate Plaintiff's employment.

On August 12, 1993, Plaintiff was called to a meeting at Defendant's Frederick Operations Center ("FOC") approximately 25 miles from her present location. She was told of plans to move her office immediately to FOC, which was located in another county and not subject to workplace smoking bans instituted by Montgomery County and the City of Gaithersburg. After expressing concerns about FOC's more relaxed smoking policy, she was told the company would be implementing a new policy, beginning September 1, which would ban smoking throughout the facility. She suggested instead, that she be required to report to the new site after the smoking ban took effect, and to remain in the office only as long as the new policy was enforced. However, Defendants

refused to oblige her request, and threatened disciplinary action if she did not report to work at FOC, under a new supervisor, immediately. Defendants also instructed Plaintiff to provide medical documentation requesting a disability leave of absence if she could not work in the smoke-filled conditions at FOC prior to September 1. Plaintiff complied with this request in a timely fashion. But, despite the fact that Defendants never questioned her need for leave due to disability, Plaintiff was never granted leave.

Plaintiff did not report to FOC the following week, but instead met with an attorney specializing in employment law. Upon learning Plaintiff had consulted a lawyer about the situation she faced at work, Defendants became upset, warning that she would "regret" what she had done. *See* Rhoads, 2001 U.S. App. LEXIS 15588 at *45. However, it was only after this lawyer's intervention that Defendants were compelled to move Plaintiff's report date to September 1. Defendants also required Plaintiff to provide yet another doctor's note stating that she should "be allowed" to work at home because the company could not provide the accommodation her physician requested. Plaintiff also complied with this request, but ultimately suffered retribution from Defendants, who, according to the testimony of SFSB President Emmett R. Garlock, were "wrong" to terminate Plaintiff in reaction to "...the period of time she was permitted to work at home because of the exposure to cigarette smoking at the 481 facility in Gaithersburg..."

While attending meetings at FOC in August 1993, Plaintiff was subjected to several hours of concentrated ETS caused by smokers who continued to violate even the more lenient smoking restrictions mandated by written company policy. This resulted in a cascade of events, including severe adverse reactions to the combination of medications prescribed to treat Plaintiff's multiple disabilities, requiring her to seek emergency medical care. *See* Rhoads, 2001 U.S. App. LEXIS 15588 at *3-4.

Between August 12 and August 31, Plaintiff was examined by four different physicians for asthmatic and migraine symptoms directly attributed to ETS exposure at Defendants' workplace.

On August 31, Dr. Alan S. Chanales, one of Plaintiff's treating physicians, performed a follow-up examination of Plaintiff in his office and instructed her not to report to work the following day, September 1, or the rest of the week. *See* Id. As per her doctor's instructions, on September 1, Plaintiff called her new supervisor, James Pavlonnis, and conveyed that, according to her doctor, she was too ill to report to work that day, or for the rest of the week. *See* Id.

Defendants' witness W. Marshall Jones testified that, at this time, he "advised" Plaintiff she was being granted sick leave for her continuing illness beginning September 1, 1993. His testimony was supported by documentation produced in the Case Memorandum for Termination.

After consulting with her treating physicians again, Plaintiff called her supervisor on September 7, the first business day of the following week, to request additional sick leave for her lingering illnesses. *See* Id. During the remainder of the week, Plaintiff maintained contact with both her doctors and her employer regarding the current state of her health.

On September 9, Plaintiff received a telephone call from Defendants requesting that a doctor's note be faxed to them immediately. In response, Plaintiff called Dr. Chanales, and his office provided Defendants with the documentation they had requested earlier. When Defendants called back the same day, Plaintiff again informed them that she was requesting sick leave for a continuing illness. *See* Id. at *4.

Defendants called Plaintiff again on September 10, and, in an abrupt reversal of their initial position (to grant Plaintiff sick leave for her serious health condition), they informed Plaintiff, for the first time, she was considered "absent without leave." They also threatened

disciplinary action if she did not report to work immediately. Defendants subsequently prepared a letter emphasizing their intentions which was hand-delivered to Plaintiff the same day. *See* Id. However, they did not request documentation to support her current illness, nor did they notify her that that documentation she had provided was insufficient. Moreover, they did not notify Plaintiff in writing that her documentation was insufficient, did not provide her with the FMLA medical certification form, and most definitely did not provide her with a reasonable opportunity to cure any deficiency as required by Federal statute. *See* 29 C.F.R § 825.305.

Despite this lack of notification, Plaintiff took it upon herself to contact her doctor, and request that he work with her attorney to provide Defendants with whatever medical documentation they might require to grant her leave for her continuing illnesses. By September 13, the following business day, Plaintiff wrote to Defendants and informed them that her doctor was preparing the medical documentation necessary to support her request for leave due to current illness, and that this information would be sent to them shortly. *See* Rhoads, 2001 U.S. App. LEXIS 15588 at *7. Plaintiff's attorney also wrote to Defendants and offered to provide any documentation necessary to support the request for sick leave. At this time, Plaintiff had been absent a mere 8 days.

Yet, despite the short duration of her illness, Defendants were already at work preparing the Case Memorandum to terminate Plaintiff's employment. The case was submitted to the Compensation and Benefits ("CAB") the very next day—on Plaintiff's 9th day of absence—several days short of the minimum required by written company policy. In fact, Defendants provided testimony that the Case for Termination was written, discussed, voted upon, signed and sent to Atlanta for approval all before Plaintiff had been absent the number of days required by company policy to even *initiate* termination procedures. *See* Rhoads v. FDIC, et. al., No.

CCB-94-1548 (D. Md. Sep. 30, 2003) at 8 reproduced in Pet. App. at 10a.

At the time Defendants rushed to terminate Plaintiff's employment, she had balances of more than 209 hours of sick leave and 139 hours of vacation leave. She was never accused of dishonesty or reprimanded, nor was she ever placed on probation for any reason at all, until just one day prior to her termination.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S CONFLICT WITH SUPREME COURT PRECEDENT AND OTHER CIRCUITS CREATE A SPLIT OF AUTHORITY AND IMPOSE UNDUE HARDSHIP ON ADA PLAINTIFFS

A. Introduction

Disability, under the ADA, is defined, *inter alia*, as "a physical or mental impairment that substantially limits one or more of the major life activities. . . [], . . .a record of such impairment; or [] being regarded as having such an impairment." *See* 42 U.S.C. § 12102(2)(A). A substantial limitation occurs when the individual is significantly "restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *See* Rhoads, 2001 U.S. App. LEXIS 15588 at *19, *quoting* 29 C.F.R. § 1630.2(j)(1)(ii) (2000). Examples of major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *See* Id., *quoting* 29 C.F.R. § 1630.2(i). Furthermore, the term "qualified individual with a disability'" means, ". . .an individual with a disability who, with or without reasnable accommodation, can perform

the essential functions of the employment position that such individual holds or desires. . ." *See* 42 U.S.C. § 12111 (8). Finally, "reasonable accommodation" may include, ". . .making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and. . . []. . . job restructuring, part-time or modified work schedules. . ." *See* Id. § 12111(9)(A)—(B).

B. A Qualified Individual With a Disability

The testimony of Plaintiff's treating physician, Dr. Chanales, echoes the ADA requirements almost verbatim:

> "[Asthma] substantially limits Ms. Rhoads' ability to perform several major life activities, when compared to the ability of the average person in the general population. []. . . the symptoms [of asthma]. . . [] . . .substantially limit her ability to breathe. . . [] . . .and her ability to perform many everyday life activities, including working in virtually any job, leaving her home, caring for herself, performing tasks requiring concentration, socializing and others. . . Specifically, like many persons with asthma, she must avoid situations that can exacerbate her symptoms. This includes, in her case particularly, *avoiding exposure to cigarette smoke at work, in restaurants, shopping malls and other public facilities* where one engages in the normal activities of everyday life. . ." (Emphasis added.)

And, there is substantial evidence that Defendants considered Plaintiff an "otherwise qualified individual with a disability." As the lower court observed, "[t]here appears to be no reasonable material or relevant factual dispute concerning the plaintiff's ability to perform her job requirements at a very high level, provided that she is given the opportunity to perform her work in a smoke-free

atmosphere. . ." *See* Rhoads, 956 F. Supp. 1239, reproduced in Pet. App. at 76a.

Jurisdictions across the country have recognized that Plaintiff's disabilities qualify under the ADA. *See* Carlson v. Inacom Corp., 885 F. Supp. 1314, 1320 (D. Neb. 1995) (migraines as a disability); Dutton v. Johnson County Board of Commissioners, 859 F. Supp. 498, 506 (D. Kan. 1994) (severe migraines that comprise a permanent, intermittent and unpredictable condition over a twenty year period constituted a disability); Hamper v. Virginia Electric & Power Co., 831 F. Supp. 1300, 1306 (E.D. Va. 1993) (severe bronchial asthma treated as a disability).

Yet, despite the abundant and uncontroverted evidence that Plaintiff is a qualified individual with a disability who is entitled to reasonable accommodation under the ADA, the lower court concluded that Plaintiff "failed to adduce sufficient evidence to prove that she was 'disabled' within the meaning of the ADA," *see* Rhoads, 2001 U.S. App. LEXIS 15588 at *13, because they observed she "engaged in physical activities including bicycling and ballet dancing [in 1984]." *See* Id. at *32. The court also determined Plaintiff failed to demonstrate ". . .there might be *many other places* [outside the Defendants' workplace] where her ailment combined with secondhand smoke [to] limit[] her ability to breathe," *see* Rhoads, 2001 U.S. App. LEXIS 15588 at *36 (emphasis added), and suggested she, ". . .show[] that she was debilitated by exposure to secondhand smoke outside of the workplace, [in order to determine] whether her ability to breathe, etc., was 'significantly restricted' as compared to the breathing ability of the 'average person in the general population.'" *See* Id. at *39.

While the standard of review for the summary judgment dismissal of Plaintiff's ADA disability claims was *de novo*, and required the Fourth Circuit to draw all reasonable inferences and take all evidence in the light most favorable to Plaintiff, *see* Porter v. United States Alumoweld Company, Inc., 125 F.3d 243 (4th Cir. Sep. 15,

1997) (*citing* Roe v. Doe, 28 F.3d 404, 406-07 (4th Cir. 1994)), it is clear that the court discounted much, if not all, of Plaintiff's expert testimony.

C. The Decision of the Court Below Is at Odds with Supreme Court Precedent

This Court previously addressed an important issue raised by the appellate court's decision—that a court of law is in a better position to assess Plaintiff's medical status as "qualified individual with a disability" under the ADA than medical experts who have had the opportunity to conduct medical examinations and clinical testing. As outlined in School Board of Nassau County v. Arline, 480 U.S. 273, 287, 94 L. Ed. 2d 307, 107 S. Ct. 11234 (1987), ". . .the district court must conduct an individualized inquiry and make appropriate findings of fact, based on reasonable medical judgments given the state of medical knowledge. . . In making these findings, courts normally should defer to the reasonable medical judgments of public health officials."

It is significant to note, the medical experts acting on behalf of Plaintiff and Defendants reached the same conclusion. In other words, there is no "conflicting expert medical opinion" to be weighed in this case. Both sides agree, Plaintiff suffers from asthma and migraine headaches—disabilities which substantially limit one or more of her major life activities. The dispute concerns the extent to which Plaintiff must "prove to others," namely, a court of law, that she is disabled under non-specific circumstances rather than follow her doctors' advice to avoid injury.

D. The Preemptive Decision to Avoid Injury

The Fourth Circuit's contention that individuals with recognized ADA disabilities must reject their doctors' sound medical advice and must deliberately injure

themselves in order to demonstrate they are substantially limited under non-specific conditions is also at odds with the prevailing law. In the First Circuit, the court observed ". . .[defendant] neither cites apposite authority for its position nor to our knowledge has any court held that ADA plaintiffs must undergo actual physical assessments of their respective capacities to engage in particular major life activities in order to establish that their ability to do so is limited." *See* Quint v. A.E. Staley Manufacturing Co., 172 F.3d 1 (1st Cir. 1999). Similarly, this Court has held that an individual's discretion in exercising the "preemptive decision to avoid injury" does not deprive them of ADA protection. But, rather ". . . through competent medical testimony an ADA Plaintiff may demonstrate that her own preemptive decision to limit or refrain from a major life activity was necessary to avoid placing herself or others at imminent risk of physical injury." *See* Id. citing Bragdon v. Abbott, 524 U. S. 624; 118 S. Ct. 2196, 2206, 141 L. Ed. 2d 540 (1998).

Contrary to existing law, the Fourth Circuit placed the overly stringent requirement on Plaintiff that she must go against her physician's recommendations, and rather than avoid situations outside of work where exposure to secondhand smoke will trigger her asthma and migraines, she must instead, openly subject herself to physical injury simply to demonstrate the "substantial limitations on the additional [major life] activities. . .[] . . .including the ability to breathe" were not all "triggered solely by her workplace environment." *See* Rhoads, 2001 U.S. App. LEXIS 15588 at *36.

II. THE DECISION OF THE COURT BELOW IS AT ODDS WITH THE STATUTORY PROVISIONS OF THE ADA AND DEPRIVES PLAINTIFF OF THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION AND DUE PROCESS OF LAW

A. Foreclosed from Working "In General"

On appeal from summary judgment, Plaintiff was given the undue burden of proving she was foreclosed from working, in general, because she could not work in smoke-filled conditions, which the lower court erroneously concluded, existed solely in one workplace. This allowed Defendants to demonstrate that their workplace was unique in at least one respect—the smoke was present because senior managers repeatedly violated the existing "no-smoking" laws and company policies. While acknowledging their own failure to abide by the law, Defendants simply speculated that there may be other employers who might require their employees to refrain from smoking in compliance with the law, and thus argued Plaintiff was not "foreclosed" from working "in general." *See* Rhoads, 2001 U.S. App. LEXIS 15588 *in general.* The appellate court went on to absolve Defendants' wanton disregard for the law, opining, "...the failure of an employer to enforce a smoking ban is hardly commendable. That failure does not mean, however, that the employer is liable for its actions, or inactions, under the ADA." *See* Rhoads, 2001 U.S. App. LEXIS 15588 at *36.

Again, the Fourth Circuit failed to consider the appeal from summary judgment *de novo*, and did not weigh the evidence in the light most favorable to Plaintiff. First, the court did not consider that the existing "no-smoking" laws only pertained to Montgomery County and the City of Gaithersburg. Frederick, where Plaintiff had been transferred shortly before her termination, as well as the rest of Maryland, Virginia and the District of Columbia, did not require workplaces to be "smoke-free" during the relevant time frame. Therefore, Plaintiff was foreclosed from working anywhere outside of Montgomery County. Yet, in denying her appeal, the court concluded, "[i]f. . . [] Rhoads had shown that she was generally foreclosed from a broad class of jobs utilizing her skills because of a

widespread tolerance of interoffice smoking, she would have bolstered her case." *See* Rhoads, 2001 U.S. App. LEXIS 15588 reproduced in Pet. App. at 53a.

B. Defenses Based on a Deliberate Violation of the Law Undermine the Spirit of the ADA

An employer who is not willing to provide reasonable accommodation, even if it means nothing more than obeying the law, should not be allowed to use as a defense, speculation about possible other employers who are willing to provide such accommodation, in order to establish "proof" that a disabled individual is not precluded from other employment "in general." Even more disturbing is the precedent set by the Fourth Circuit's decision. In the future, if an employer does not want to provide reasonable accommodation, he can escape liability by arguing that other employers routinely obey the law, therefore, the disabled may "go elsewhere" for a job and are not foreclosed from working. Conceivably, any employer would be able to apply this "law-breakers' loophole" to cover any disability. If Defendants were allowed this defense, it would completely undermine the protection afforded by the ADA. In reference to this subject, attorneys from the General Counsel's Office of the EEOC contacted Plaintiff and have indicated, "the government would be very interested in participating" as an *amicus curiae* to address this particular issue, should the Court grant certiorari.

C. Segregation as a Means of Providing "Reasonable Accommodation"

Defendants argued they had accommodated Plaintiff's request for a smoke-free workplace by "allowing" her to work at home. In fact, it was undisputed that Defendants took no formal action to enforce the written no-smoking policies in its offices until October 1, 1993, and that

smoking continued, unabated, prior to that time[2].

Within the language of the ADA, Congress, "for the first time, referred expressly to 'segregation' of persons with disabilities as a 'form of discrimination...'" *See* Olmstead v. L.C., 527 U.S. 581; 119 S. Ct. 2176; (S. Ct. June 22, 1999). Elaborating further, this Court noted, "The statute as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' [42 U.S.C.] § 12101(b)(1)." Id. at *588.

D. Sick Leave as Reasonable Accommodation

In assessing Plaintiff's request for use of sick leave as an accommodation, the lower court concluded, ". . .the use of accrued sick leave, part-time or modified work schedules may in some cases be an appropriate accommodation. *See* 29 C.F.R. § 1630.2(o)(2), (Appendix). However, such accommodation was not required in this case." *See* Rhoads, 956 F. Supp. 1239 at *1248. This determination was based on the court's erroneous conclusion that Defendants followed established company policies in the decision to terminate Plaintiff's employment, when in fact, company policies had been violated. Mercifully, this fact was brought to light during the most recent trial at which the court observed, ". . . although company policy allowed termination after ten or more days of unexcused absence, her former supervisors initiated termination proceedings before she accumulated ten such absences." *See* Rhoads, No. CCB-94-1548 (D. Md. Sep. 30, 2003) at 8 reproduced in Pet. App. at 10a. However, the court's recognition of the error has done nothing to overturn the earlier judgments based on this error.

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[2] Even after September 1, 1993, when FOC was supposedly "smoke-free," Defendants' employees continued to violate the smoking ban and were given written warnings which were introduced as evidence at trial.

III. THE FOURTH CIRCUIT'S DECISION ON AN EMPLOYER'S RIGHT TO CHALLENGE DIVERGES FROM OTHER DECISIONS, OTHER COURTS OF APPEAL, AND RELEVANT LAW

A. Introduction

The FMLA provides up to 12 weeks of unpaid leave for eligible employees who provide adequate notice of the need for leave, such as a serious health condition.

> ". . .For the purposes of the FMLA, 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves. . . [*inter alia*]. . . [a]ny period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider. . ." See 29 C.F.R. § 825.114:

The Fourth Circuit assumed, without deciding, that Plaintiff, "proffered adequate notice to invoke FMLA protections and submitted sufficient medical certification of her condition. *See* 29 C.F.R. § 825.303(a) (1993); 29 U.S. C. § 2613(a), (b)(1)-(3), (4)(B); infra note 9." *See* Rhoads, 2001 U.S. App. LEXIS 1558 at *14. The focus of its inquiry with respect to Plaintiff's FMLA claim was two-fold, "(1) whether it was appropriate for the district court to require Rhoads to prove that she suffered from a serious health condition in order to prevail on her FMLA interference claim. . ." id., and "(2) whether Rhoads established an FMLA-qualifying condition as a matter of law in light of SFSA's failure to pursue the second opinion procedures. . ." id. *See* 29 U.S.C. § 2611(11); 29 U.S.C. § § 2613(c)-(d).

It is undisputed that Plaintiff complied with the FMLA notification requirements, thereby shifting the burden to Defendants to either grant her FMLA leave or to request the appropriate medical documentation if they had reason to question her need for leave. On this issue, the employer must:

1) "Give written notice of a requirement for medical certification. . ." *See* 29 C.F.R. § 825.305(a);
2) Allow the employee "at least 15 calendar days after the employer's request" to provide such certification. *See* 29 C.F.R. § 825.305(a);
3) Request only the information sought by the Department of Labor's model certification form, which Defendants adopted under their FMLA policy. *See* 29 C.F.R. § 825.306; and
4) "Advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency." *See* 29 C.F.R. § 825.305(c).

Where the employer has reason to doubt the validity of the certification submitted by the employee, the employer may require the employee to obtain a second medical opinion from a health care provider designated by the employer. *See* 29 C.F.R. § 825.307(a). Where the opinions of the two health care providers differ, the employer may require the employee to obtain certification from a third health care provider chosen jointly by the employer and the employee. *See* Id. at § 825.307(c). The opinion of the third health care provider shall be final and binding.

Yet, it is also undisputed Defendants failed to abide by any of the provisions under the FMLA medical certification process, choosing instead to rush through Plaintiff's termination in violation of company policy.

Plaintiff's medical expert, who was one of her treating physicians, testified she was suffering from a serious

health condition at the time she requested leave, and that he had advised her not to report to work. In reply, Defendants failed to offer even a scintilla of medical evidence to dispute the doctor's findings and failed to call any witness to testify on any level about Plaintiff's health. Instead, Defendants contend they "didn't believe" Plaintiff was sick. *See* Id. at *18. However, in light of the new evidence produced at the second trial, this so-called "defense" appears dubious at best. As stated *supra*, Defendants' witness Jones testified he advised Plaintiff she was being granted sick leave as of September 1. When asked why he approved Plaintiff's termination for "excessive unexcused absences" when he had previously advised her that she was being granted sick leave, Jones could not provide an answer. All of this evidence was compelling enough to lead the jury to conclude, "the reasons given by the FDIC for [Plaintiff's] termination were false. . ." *See* Rhoads, No. CCB-94-1548 at 3 reproduced in Pet. App. at 6.

B. The Decision of the Court Below Conflicts With Prevailing Precedent and a Literal Reading of the Law

The Fourth Circuit determined Defendants' failure to abide by FMLA medical certification procedures did not preclude them from contesting Plaintiff's serious health condition at trial. This opinion was supported by an earlier decision in the Eighth Circuit. *See* Stekloff v. St. John's Mercy Health Systems, 218 F.3d 858, 863 (8th Cir. 2000), which notes, "[t]he language of 29 U.S.C. § 2613(c)(1), [] is merely permissive: It states that an employer with 'reason to doubt the validity' of the employee's certification 'may' require the employee to obtain the opinion of a second health care provider."

However, simply viewing an element of the statue, in isolation, is not sufficient to assess the intent of the law. The court overlooked the fact that an employer is bound

by law to grant FMLA leave from time notice is given. *See* 29 C.F.R. § 825.304(c), "In all cases, in order for the onset of an employee's FMLA leave to be *delayed* due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements." (Emphasis added.) *See* 29 C.F.R. § 825.312(b), "If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay *continuation* of FMLA leave until an employee submits the certificate." (Emphasis added.) *See* 29 C.F.R. § 825.307 (a)(2), "An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is *provisionally* entitled to the benefits of the Act." (Emphasis added.) In other words, an employer has an upstream obligation to grant interim FMLA leave from the time of notice and must provide sufficient time to cure any defencies in either the employee's notice or medical certification.

It is undisputed Defendants in this case did not comply with the FMLA notice requirements by posting the necessary information, *see* 29 C.F.R. § 825.301, nor was there a material dispute over the adequacy of Plaintiff's notice. Therefore, Plaintiff was entitled to FMLA leave, and if Defendants felt there were deficiencies in any areas, under the law, Plaintiff was entitled to correct them in a timely manner. *See* Miller v. AT&T Corporation, 250 F.3d 820, 843 (4th Cir. May 7, 2001) ". . .to deny a leave request on the basis that supporting documentation was not submitted would be unconscionable. Moreover, to the extent it viewed [employee's] certification as incomplete, [employer] was required to provide [employee] with a reasonable opportunity to cure any deficiency."

Defendants admitted they never asked Plaintiff to

provide any medical documentation to support her need for FMLA leave, nor did they question the adequacy of the medical documentation she provided on her own until just two days before she was terminated. *See* Miller, 250 F.3d 820, 843 at *835 ("[e]mployer's challenges to employee's need for FMLA leave 'attempt to take [employee] to task for failing to provide information that [employer] did not request, and accordingly, [the court] reject[s] them.'") Furthermore, the law holds that when an employee acts on the advice of her doctor, she is entitled to FMLA leave, even if it is later determined she did not have a serious health condition. *See* Miller, 250 F.3d 820, 843 *in general.*

Less than 14 hours after Plaintiff was notified of her termination, Defendants received a letter from Dr. Chanales which, they admit, was sufficient to grant FMLA leave[3]. The receipt of this medical documentation was well within the 15 calendar day timeframe afforded by the FMLA, *see* 29 C.F.R. § 825.305(a), and was provided independently of any request made by Defendants. There can be no question Defendants violated multiple provisions of the FMLA. *See* 29 C.F.R. § 825.400(c), "If an employer has violated one or more provisions of FMLA... []an employee may receive... wages, employment benefits, or other compensation..." as well as interest, liquidated damages, equitable relief, attorney's fees, expert witness fees and other costs of the action, in addition to any judgment awarded by the court. *See also* Estes v. Meridian One Corp., 2001 U.S. App. LEXIS 4443 (4th Cir. 2001).

C. The Decision of the Court Below Conflicts with Uniform Rules of Procedure

If employers are not to be foreclosed by law for failing

[3] In error, the Fourth Circuit concluded this letter would not have been sufficient to grant FMLA leave. *See* Rhoads, 2001 U.S. App. LEXIS at *6, n3. However, Defendants' witnesses testified that it was sufficient.

to abide by the FMLA medical certification procedures, then in order to avoid adverse judgment, they must assert an affirmative defense. "An affirmative defense is one which directly or implicitly concedes the basic position of the opposing party, but which asserts that notwithstanding that concession the opponent is not entitled to prevail because he is precluded for some other reason." *See* Choice Hotels International, Inc. v. Madison Three, Inc. et. al., 83 F. Supp. 2d 602 (D. Md. 2000). Under an affirmative defense scheme, the burden shifts to Defendants to demonstrate, by a preponderance of evidence, why they were justified in violating federal law. As observed in Atlantic Limousine, Inc. v. National Labor Relations Board, 243 F.3d 711 (3rd Cir. 2001), "[defendant's] attacks on the employees' proof, and its excuses for lack of evidence, cannot distract us from the fact that the burden of proof is on the employer, as the wrongdoer, to establish facts to dispute the claim of the aggrieved employee. . ." *citing* NLRB v. Brown & Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963). *See* Miller, 250 F.3d 820, 843 at *836, affirming the district court's orders of employer liability because employer "failed to meet its burden of establishing that [employee] was not entitled to FMLA leave. . ."

In this case, Defendants claim they denied Plaintiff FMLA leave, "because Rhoads's supervisors had reason to disbelieve she was sick." *See* Rhoads, 2001 U.S. App. LEXIS 15588 at *7. Yet, Defendants failed to state this as an affirmative defense and failed to follow Federal Rule of Civil Procedure 8(a), (c) in making such an argument. This allowed them to escape the necessary burden of proof.

D. An Employee's Decision to Follow Her Doctor's Advice

On appeal, Plaintiff asserted the Special Verdict Form

reproduced at Pet. App. 109b, was in error because it allowed a jury to make a *de novo* determination of her "serious health condition." According to prevailing law, an employee's decision to follow her doctor's advice is not sufficient reason to terminate her employment. *See* Reich v. Standard Register Co., 1997 U.S. Dist. LEXIS 3021 (W. D. Va. 1997), "The FMLA contemplates that decisions of whether an employee has a 'serious health condition' will be made by doctors. . ." and the court ". . .will not second-guess the doctors' medical evaluations." Moreover, "the concept of 'serious health condition' was meant to be 'broad'. . ." *See* Stekloff, 218 F.3d 858, 863 at *861, *citing* S. Rep. No. 103-3, at 28 (1993), reprinted in 1993 U.S.C.C. A.N. 3, 30, *and* Hodgens v. General Dynamics Corp., 144 F.3d 151, 164 (1st Cir. May 21, 1998). For example, in Stekloff, the appellate court reversed the lower court's grant of summary judgment to the employer, reasoning that the employee's ability to work at another job, while she was taking FMLA leave, was not sufficient to question her serious health condition. In fact, an employee need only demonstrate she cannot perform the specifics of her position in order to qualify for FMLA leave. *See* Stekloff, 218 F.3d 858, 863 *in general.* Therefore, Plaintiff need not prove she had a serious health condition in order to meet the FMLA standard, as suggested by the Fourth Circuit's ruling—it is sufficient for her to demonstrate she was following the advice of her treating physician. To allow an employer to challenge an employee's need for leave outside the confines of an affirmative defense would diminish the integrity of the FMLA. This prospect is so disturbing, attorneys from the Department of Labor's Office of General Counsel contacted Plaintiff about participating as an *amicus curiae* to address this particular issue, should the Court grant certiorari.

IV. FDIC HAS NO SOVEREIGN IMMUNITY WHEN IT ACTS AS RECEIVER FOR A FAILED FINANCIAL INSTITUTION

A prevailing ADA Plaintiff is entitled to punitive damages if the employer acted with malice or with reckless indifference to federally protected rights of the employee. *See* 42 U.S.C. §§ 12101 et. seq. Additionally, *42 U.S.C. § 1981*(a)(b)(I), provides for punitive damage based solely on employer's state of mind and employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *See* Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224 (2nd Cir. 2000); s*ee also*, Greenway v. Buffalo Hilton Hotel, 143 F.3d 47 (2nd Cir. 1998) (employee was entitled to punitive damages for discriminatory wrong he suffered in being fired, plus interest, costs, and attorney's fees.) The additional remedies of prejudgment interest and reasonable attorney's fees, including litigation expenses, and costs, are available to a prevailing plaintiff in an ADA retaliation action. *See* 42 U.S.C. § 12205.

Yet, the lower court erred by accepting Defendants' erroneous arguments of sovereign immunity in order to bar Plaintiff from recovering punitive damages and prejudgment interest. Under relevant law, whatever sovereign immunity the FDIC may have does not pass through to the underlying institution in receivership. In this case, Plaintiff brought suit against the FDIC *as receiver* for SFSB.

> "[]. . .when acting in its receivership capacity for a failed institution, the FDIC, 'by operation of law, succeed[s] to' all rights, titles, powers, and privileges of the insured depository institution. 12 U.S.C. § 1821(d)(2)(A)(i). Thus 'standing in the shoes' of the failed bank, the FDIC shoulders the rights and liabilities of the insured depository institution that existed prior to receivership. *See* O'Melveny & Myers v. FDIC, 512 U.S. 79, 86 (1994)." *See* Color Leasing 3, L.P. v. FDIC, as Receiver for Old Stone Bank, 975 F. Supp 177 (D. RI, Jun. 30, 1997).

Moreover, the FDIC has been given the power "[t]o sue and be sued, and complain and defend, by and through its own attorneys, in any court of law or equity, State or Federal." *See* 12 U.S.C. § 1819(a). Courts have held that the intent of the "sue and be sued" language of the FDIC's enabling legislation is expressly to waive the "sovereign immunity" status of FDIC. *See* Poe v. Memphis Light, Gas & Water Division, 1999 U.S. App. LEXIS 32083, *8-10 (6th Cir. Nov. 30, 1999) ("Congress has waived the sovereign immunity of certain federal entities from the time of their inception by including in the enabling legislation provisions that they may sue and be sued.") *See also*, Beninati v. FDIC, 55 F. Supp. 2d 141 (E.D. NY Jul. 14, 1999) ("Suits against the FDIC [] may be appropriate under certain circumstances. The FDIC has the statutory power to 'sue and be sued, and complain and defend, in any court of law or equity, State or Federal.' 12 U.S.C. § 1819.") Finally, the purpose of sovereign immunity is to "shield the Federal Government and its agencies from suit." *See* Gao v. Jenifer, 185 F.3d 548 (6th Cir. 1999).

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"

See Id., *quoting* Dugan v. Rank, 372 U.S. 609, 620 (1963) (internal citations omitted) (*quoting* Land v. Dollar, 330 U.S. 731, 738 (1947) *and* Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949); *citing* Ex parte New York, 256 U.S. 490, 502 (1921)). According to information provided by the FDIC on its website, "[t]he FDIC receives no Congressional appropriations – it is funded by premiums that banks and thrift institutions pay for deposit insurance coverage and from earnings on

investments in U.S. Treasury securities." Thus, it is independent of the sovereign and cannot invoke immunity.

It should also not go without notice that Defendants recently settled a class action law suit alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16, et. seq. The FDIC, as defendants in Conanan v. FDIC, No. 00-CV-3091 (ESH) (D. DC. Jan., 2002) agreed to pay $14 million to settle claims for "back pay, front pay, employment benefits. . . [] interest (including both pre-judgment interest and post-judgment interest), and compensatory damages, as well as... [] all attorneys' fees and costs..." *See* Conanan at 19. Yet, if Defendants are to be believed, i.e., that the FDIC has sovereign immunity from Federal employment claims, it is difficult to understand why they would be willing to pay $14 million to settle discrimination claims brought by Conanan. The fact is, Defendants have no such immunity and are liable to Plaintiff for all claims specified under ADA statute.

V. THE DECISION OF THE COURT BELOW ON PLAINTIFF'S STATUS AS A PRO SE DENIES HER DUE PROCESS OF LAW

As the prevailing party, Plaintiff is entitled to certain monetary awards in addition to damages. *See* 42 U.S.C. § 12205:

> "In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual."

However, under Federal civil rights fee-shifting

statutes, *pro se* litigants are not eligible for an award of attorney's fees for their time. *See* 42 U.S.C. § 1988. Thus, Plaintiff did not request any fees for her time. She did, however, seek to recover the out-of-pocket costs of litigation. The lower court erroneously concluded Plaintiff is not entitled to recover litigation expenses incurred as a *pro se*, *citing* Clarke v. Parkinson, 225 F. Supp. 2d 345, 355 (S.D. NY. 2002) ("Where an individual litigant elects to undertake legal research, or factual research, or other case-related tasks, even in order to save counsel fees, the litigant whould not expect to have the costs of his or her efforts included in any determination of litigation expenses."). *See* Rhoads, No. CCB-94-1548 (D. Md. Sep. 30, 2003) at 20. Yet this comparison is not appropriate—Plaintiff was seeking reimbursement, not compensation.

In contrast to the lower court's determination, there is authority to support recovery of litigation expenses and costs by *pro se* litigants. *See* Davis v. Parratt, 608 F.2d 717 (8th Cir., 1979) (*pro se* denied attorney fees under 42 U.S.C. § 1988, but awarded partial indemnification for litigation expenses); *and* Kay v. Ehrler, 111 S. Ct. 1435 (1991) at n3 (petitioner awarded costs but denied attorney's fee) . This Court in Kay went on to explain "[i]f private citizens are to be able to assert their civil rights, . . .then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *quoting* S. Rep. No. 94-1011, p.2 (1976). Id. at n3.

CONCLUSION

For the reasons set forth in the preceding sections of this petition, Plaintiff respectfully requests this Court grant her petition for a writ of certiorari.

August 16, 2004

Respectfully submitted,

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